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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. ----------.

SOUTH SHORE PACKING CORPORATION,
Petitioner,

vs.

CITY OF VERMILION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, entered in this cause on February 15, 1967 denying a rehearing in this cause and affirming the judgment of the Sixth District Court of Appeals of Ohio, which in turn entered a judgment for the Defendant, the City of Vermilion, the Respondent herein.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Court of Common Pleas is unreported and is printed in the Appendix, page 19. No opinion was rendered by the Court of Appeals or by the Supreme Court of Ohio.

JURISDICTION.

The judgment of the Supreme Court of the State of Ohio was entered on February 15, 1967 upon Petitioner's timely application. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3), since the rights, privileges and immunities under the United States Constitution and the Constitution of the State of Ohio and the Revised Code of the State of Ohio are claimed to have been violated.

QUESTIONS PRESENTED.

I. Does a municipal corporation have the right to take the real property of a private citizen for the alleged purpose of building a sewage plant thereon when the municipal corporation knew before they passed the Ordinance and Resolution and thereafter that the land of the Petitioner was not usable and would in fact never be used for such purpose or purposes?

II. Does the mere passage of a Resolution and Ordinance attempting to take the Petitioner's land for sewage purposes deprive the Petitioner from the right of defending the action of the municipal corporation upon the grounds that the Ordinance and Resolution which were passed were in fact untrue and that the said municipal corporation did not intend, and does not now intend, and cannot use the Petitioner's lands for sewage purposes?

III. Does the Constitution of the United States of America, to wit: Amendment V to the Constitution of the United States, Amendment XIV, Section I to the Constitution of the United States, Article I, Section 1 of the Constitution of the State of Ohio, Article I, Section 19 of the Constitution of the State of Ohio, and Article XVIII, Section 10 of the Constitution of the State of Ohio, forbid taking of private property of a citizen without due process, thereby depriving the Petitioner of the equal protection of the laws and due process?

IV. Are the courts of Ohio and the Supreme Court of the United States required to follow sections of the Revised Code of the State of Ohio now in force, to wit: Sections 163.01, 163.02 and 163.08, which sections hold that the taking of land by a municipal corporation is a judicial question as well as a legislative right?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States.

AMENDMENT V:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT XIV, Section I:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Ohio.

Article I, Section 1:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Article I, Section 19:

"Private property shall ever be held inviolate but subservient to the public welfare. * * * and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assesed by a jury, without deduction for benefits to any property of the owner."

Article XVIII, Section 10:

"A municipality appropriating or otherwise acquiring property for public use may in furtherance of such

public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. * * *"

Statutes.

R. C. 163.01:

"Definitions.

As used in sections 163.01 to 163.22, inclusive, of the Revised Code:

(A) "Public agency" means any governmental corporation, unit, organization, or officer authorized by law to appropriate property in the courts of this state. "Private agency" means any other corporation authorized by law to appropriate property in the courts of this state. "Agency" includes any public agency or private agency.

(B) "Court" includes the court of common pleas and the probate court of any county in which the property sought to be appropriated is located in whole or in part.

(C) "Owner" includes any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated.

(D) "Real property," "land," or "property" includes any estate, title or interest in any real property which is authorized to be appropriated by the agency in question, unless the context otherwise requires."

R. C. 163.02:

"Applicability of chapter; exceptions.

All appropriations of real property, except as otherwise authorized by this section, shall be made

pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code. The director of highways may appropriate any interest in real property pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code or as otherwise provided by law.

Where so authorized by sections 6101.01 to 6101.84, inclusive, of the Revised Code, a conservancy district may appropriate real property by procedures prescribed in such sections.

Where so authorized by sections 6115.01 to 6115.79, inclusive, of the Revised Code, a sanitary district may appropriate real property by procedures prescribed in such sections."

R. C. 163.08:

"Answer by owner.

Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. Any answer shall be filed on or before the third Saturday after the return day of the summons or service by publication as set forth in section 163.07 of the Revised Code. No extension of time for filing of an answer shall be granted."

STATEMENT.

The Respondent, the City of Vermilion, filed an action in the Court of Common Pleas of Erie County, Ohio, under Case No. 35245, to appropriate four (4) lots located on Water Street in Vermilion, Ohio, said lots having a width of two hundred forty (240) feet and an average depth of one hundred eighteen (118) feet. In accordance with the proper practice in the State of Ohio, the Petitioner, South Shore Packing Corporation, then filed an action against the Respondent, the City of Vermilion, to enjoin said City from appropriating such property, also in the Court of Common Pleas of Erie County, Ohio, and bearing Case No. 35481. In its Petition in the latter case the Petitioner fully set forth that the action of the City of Vermilion, as previously mentioned, was improper, capricious and contrary to the Constitution of the State of Ohio and of the United States, specifically mentioning that the lands of the Petitioner were not needed for a municipal sewage plant, and that the City would, in fact, never use such land for such purposes, even though the Resolution and Ordinance passed by the City specifically stated that the purpose of such Resolution and Ordinance was for the erection of a sewage system. Nevertheless, the taking of such lands would be contrary to the Constitution of the United States of America and the State of Ohio.

The Petitioner further advised the Respondent that its lands were at least twenty-five (25) feet higher than any of the lands in the valley area in which the sewage plant was to be located.

Eventually a trial was had before the Honorable LeRoy F. Kelly, sitting by assignment, in the Court of Common Pleas of Erie County, Ohio; that the Court finally gave judgment to the Respondent, the City of Vermilion, in which the Court said:

"The Court agrees with counsel for the Defendant that the taking of this said land will be for a public use and therefore, the only questions remaining at issue are whether or not the City abused its discretion or exercised bad faith or committed fraud in deciding to appropriate Plaintiff's land."

From this judgment the Petitioner appealed to the Sixth District Court of Appeals of Ohio filing the necessary briefs and memorandums required; that a hearing was had before the Court of Appeals, and they overruled the Petitioner's appeal and sustained the judgment of the Common Pleas Court. The verbiage of the Court of Appeals in its decision very closely resembled the verbiage of the Honorable LeRoy F. Kelly, to wit:

"Upon consideration of all of these items, and being fully advised in the matter, the court finds that the action of the defendant-appellee, City of Vermilion, to appropriate certain land owned by the plaintiff-appellant, South Shore Packing Corporation, for a municipal sewage disposal plant is authorized by law; that the appropriation proceedings are valid and were properly initiated by legislation of the City Council of said defendant-appellant, pursuant to such appropriation proceedings, is necessary for a public use and purpose; that the evidence does not show fraud, bad faith, collusion or an abuse of discretion on the part of said defendant-appellee."

From the decision of said Court of Appeals your Petitioner then filed a memorandum to the Supreme Court of Ohio in support of claimed jurisdiction of the Supreme Court on a motion to certify and of the right to appeal on constitutional questions. Petitioner in said Court submitted all of the facts of the case as well as the law indicated herein; that the Supreme Court of Ohio refused

to take jurisdiction in the matter and on a motion for rehearing again refused to take jurisdiction.

A reading of the decisions of the courts below indicates that both the Court of Common Pleas and the Court of Appeals took as a matter of law the proposition that the mere passing of a resolution and ordinance by a municipal corporation was the only step required by such corporation to take such real property, and that there was no defense of any kind allowable except that of fraud or bad faith.

The Honorable Judges totally disregarded decisions of this Court and the decisions of the courts of the State of Ohio on the same subject, and also disregarded the law of Ohio as contained in the Revised Code Sections 163.01, 163.02 and 163.08, which very clearly indicated that a judicial question existed and not a mere question as to whether or not an ordinance and resolution were passed to appropriate lands. It is therefore totally apparent that in entering their judgments against the Petitioner the Courts totally disregarded all the applicable sections of the Constitution of the United States and of the State of Ohio as mentioned herein, and also totally disregarded the applicable provisions of the Ohio Revised Code, to wit: Sections 163.01, 163.02 and 163.08.

The trial in the Common Pleas Court disclosed evidence that the City Engineer was a full partner to a company known as R. E. Warner and Associates, with whom the City contracted to do the sewage engineering work. It also showed that a number of members of City Council and the well-to-do people of Vermilion, Ohio and vicinity lived in a little island southeast of the City called the Lagoons, which was crossed by a bridge, and that the current sewage plant now existing was located on this little island; that the area, having become very desirable

for dwelling houses, the city officials, including Mr. Warner of R. E. Warner and Associates, the engineers, decided to place it elsewhere since the system was not efficient and was causing malodor, so that the primary purpose of creating a new sewage plant was getting the plant away from the Lagoons and into an area not built up. The Resolution and Ordinance were therefore not for a public purpose at all, but for the private benefit of the residents of the Lagoons and against the public interest at large.

The passage of the Resolution and Ordinance was done without notice to the people of the City of Vermilion or to the Petitioner. Both the Resolution and Ordinance were passed as emergency measures without argument and without discussion.

REASONS FOR GRANTING THE WRIT.

The proposed taking of the Petitioner's land is contrary to the laws of the State of Ohio, especially Sections 163.01, 163.02 and 163.08. The Resolution and Ordinance under which it was passed were illegal and improper inasmuch as councilmen who testified at the hearing stated they didn't know anything about the proposed sewage improvement plan except as they had been advised by Mr. Ochse, the City Engineer, whom the Court will remember is a partner of R. E. Warner and Associates; that they accepted Mr. Ochse's statements without challenge or debate.

Petitioner points out that it is illegal and indecent for a City Engineer, whose word is taken absolutely as to a city's needs, to hire his own firm to authorize a million dollars worth of sewage improvements and to pick out what lands should be used for such purpose and to place

such sewage plant in such a manner as will increase the value of the dwelling houses in which Mr. Warner lived as well as some other members of Council. It is specifically pointed out that none of the Judges below from the Court of Common Pleas to the Supreme Court of Ohio considered the proposition that the appropriation of land in Ohio is a judicial question. None of the Judges took stock in any of the evidence indicating that there was an absolute lack of necessity for taking such land, and that no deliberations were had in attempting to take such land or in passing the Resolution and Ordinance. The Court will read the testimony by the President of City Council on page 47 of the Record of the testimony in which he states:

> "Q. And based upon your own independent knowledge, if you have any on this subject, and disregarding anything Mr. Ochse or R. E Warner and Associates may have told you, or other members of council, isn't it a fact that you do not know whether or not the city of Vermilion must have these four lots of the plaintiff to build its sewage plant? * * *
>
> A. Being—again, not being an engineer I cannot say. I have to more or less rely on an expert in this position and I feel that if the engineering drawings and the necessary plans show that we need it and I feel that my own independent thinking is that we would need it."

Petitioner submits that the testimony of Cornelius G. Maloney, which appears in the Record, is a graduate Civil Engineer and who testified that he made a study of the area in question. Some of his testimony appears at pages 9, 12, 19 and 20 of his deposition, which reads as follows:

Page 9:

> "Q. My question related to this report (Plaintiff's Exhibit 1) as it exists. Was this report as it exists sufficient in scope from an engineering point of view

to advise the city as to what type of plant it ought to have and where it ought to be?

A. My answer to that would be definitely no.

Q. The reasons for that, Mr. Maloney?

A. You are asking me?

Q. Yes.

A. Well, many principles of engineering are not determined at this point. There is a great deal of additional engineering research that should be done before a conclusive report is handed to the city, upon which the city is going to predicate the entire program."

Page 12:

"Q. If the City of Vermilion, Mr. Maloney, used Plaintiff's Exhibit 1 as their authority for deciding to erect a sewage plant in the place where it is proposed to be used, in your opinion would the city have had sufficient information to base its decision?

A. I would answer that no. Because, I replied earlier, that this is a preliminary study, and this study should lead to a further engineering study. This should have been given purely as a preliminary report."

Page 19:

"Q. Now, if you will, look at this map, would you please, and tell us whether any portion of the Plaintiff's lots would be included in the needs for the plant desired by the City of Vermilion? * * *

A. Your question to me, if I recall, was did anything planned here touch their lots. The answer is no. According to the scale of this map.

Q. I will ask you the same question exactly to the second increment Circa 1974, marked B.

A. The same answer."

Page 20:

"Q. I will ask the same question as to the alternate second increment, Circa 1974, marked C.

A. The same answer.

Q. I will ask you the same question as to the third increment, Circa 1990, marked D.

A. The same answer applies to that.

Q. Now, with reference to all these questions and all these answers, isn't it a fact that the City of Vermilion in that particular study has pushed its program up to at least 1990?

A. This program is laid out to 1990, yes.

Q. And nowhere in that program—I will ask you —is there anywhere in that program that the Plaintiff's lands are included in the proposed needs of the City of Vermilion, is that correct?

A. I don't know what you mean by proposed needs. If you mean construction facilities on the property, the answer to that is it does not indicate that they need the property for any construction, no."

Statement of Law.

The Petitioner herein relies upon the case of *Cincinnati v. Vester* as decided by the Sixth Circuit Court of Appeals, 33 Fed. 2d 242, 68 ALR 831, affirmed by the United States Supreme Court, 281 U. S. 439, 74 L. Ed. 950, 50 Supreme Court 360, and upon the case of *City of East Cleveland v. Nau* decided by the Ohio Supreme Court in 1931, 124 Ohio St. 433, 179 Northeastern 187.

In the case of *Cincinnati v. Vester,* the City of Cincinnati had passed an ordinance to appropriate a 25 foot strip for the purpose of widening Fifth Street and in addition, undertook to appropriate areas adjacent to this strip. The sole question for decision was whether the additional property was to be devoted to a public or a private use. *As we have set forth previously, there is no showing that the property in the case at bar will be used for any public use within the foreseeable future.*

The appropriation ordinance in the *Vester* case was passed pursuant to Article XVIII, Section 10 of the Constitution of Ohio authorizing "excess condemnation," which is the taking by eminent domain of more property than is necessary for a public improvement and subsequently selling or leasing the surplus. The City based its claim upon three theories: the first, that the balance of the property not taken would be valueless; the second, that the City needed to sell the adjacent land under restrictions to preserve the beauty and usability of the street; and third, that the City could sell property not needed and thereby recoup part of the cost. The Circuit Court of Appeals in the opinion says at page 835:

> "It is to be admitted that, under our present methods of living, public necessity requires that the citizen be deprived of much of the freedom of the use of his property that formerly seemed to inhere in its ownership. In dealing with this enlarged public interest the courts, nevertheless, have not departed from established principles, but have only applied them to new conditions; and it is the law now, as it always has been, that the due process clause of the Constitution applies to the state and all of its agencies. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581; City R. Co. v. Citizens' Street R. Co., 166 U. S. 557, 41 L. Ed. 1114, 17 Sup. Ct. Rep. 653. It is equally well settled that condemnation for a non-public use is a denial of due process of law (Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. Ed. 462, 25 Sup. Ct. Rep. 251), and that whether the use is public or private is a judicial question (Hairston v. Danville & W. R. Co., 208 U. S. 598, 52 L. Ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008)."

* * * * *

"We do not say that the City of Cincinnati might not in a proper case take land adjacent to one of its public streets for a lateral support or to preserve the street as such. Neither do we decide that there may not be cases where the remnant would be so small as compared to what was actually needed and taken that what was needed might not be regarded, in view of what was left, as the equivalent of the entire tract, and thus the entire tract be taken. We consider only these cases before us; and what we decide is that the proposed use is not a public use within the meaning of that term, as it heretofore has been held to justify the taking of private property. The provision of the Constitution is that the municipality in acquiring property for public use 'may, in furtherance of such public use,' appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as 'shall be appropriate to preserve the improvement made.' This would seem to mean in furtherance of the normal use to which the property that is occupied by the improvement is devoted—here the use and preservation of the street for the purposes of travel. If it means, as the city here contends, that property may be taken for the purpose of selling it at a profit and paying for the improvement, it is clearly invalid."

This case was affirmed by the Supreme Court in 1929 in the case of *Cincinnati v. Vester*, 281 U. S. 439. In the opinion at page 955 (L. Ed.), the Supreme Court says:

"It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.

* * * * *

"Under the provision of the Constitution of Ohio for excess condemnation when a city acquires property for public use, it would seem to be clear that a mere

statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted."

* * * * *

"The general declaration of the resolution of the city council, and of the ordinance if that may be read with the resolution, for the excess condemnation in the present case, is plainly not a definition."

Following the *Vester* case, in the case of *City of East Cleveland v. Nau,* 124 Ohio St. 433, 179 Northeastern 187, the Court says in the opinion at page 436:

"The city and property owner both cite the case of City of Cincinnati v. Vester, 281 U. S. 439, 50 Sup. Ct. 360, 74 L. Ed. 950. The City contends that its proceedings were in accord with the rule there enunciated. This the property owner denies. That case is authority for the principle that under Section 10, Article XVIII of our State Constitution, municipal legislation failing to define the purpose of excess appropriations in definite and specific terms cannot be sustained, and that in applying the 14th Amendment of the federal Constitution to cases of excess appropriation of private property the question, What is a public use? is a judicial one. It follows *a fortiori* that the city is required not only to define specifically the purpose of the appropriation in its legislation, but it is incumbent upon the city to sustain such requirement by proof of its necessity, since the power granted to a municipality to appropriate excess property in furtherance of a public use is only granted when the excess is reasonably needed for that use."

Neither of said cases have been overruled, reversed nor modified.

In 1965 the State Legislature adopted a new chapter on eminent domain, particularly Sections 163.01, 163.02 and 163.08. The right of a property owner to answer specifically granted by Section 163.08 is a legislative recognition that the question of necessity is a judicial and not exclusively a legislative question.

The case of *Senn v. Tile Layers Protective Union, Local No. 5*, Wis. 1937, 57 S. Ct. 857, 301 U. S. 468, 81 L. Ed. 1229 is referred to in 28 U. S. C. A. § 1257, Note 192 at page 240, where it is said:

> "Where it appeared that provisions of Wisconsin Labor Code were relied on, that their validity under U. S. C. A. Const. Amend. 14 was duly challenged below and that rulings of state courts were based ultimately on the Labor Code and where federal Supreme Court had never expressly passed on question whether the Labor Code as construed and applied violated said amendment, motion to dismiss appeal from judgment of state court upholding the Labor Code for want of jurisdiction was denied."

The case of *Western Turf Ass'n v. Greenbert*, Cal. 1907, 27 S. Ct. 384, 204 U. S. 359, 51 L. Ed. 520 is referred to in 28 U. S. C. A. § 1257, Note 198 at page 248, where it is said:

> "The judgment of the highest court of a state, sustaining, as a legitimate exertion of the police power of the state, a statute, the validity of which was challenged as repugnant to the Federal Constitution, is reviewable in the federal Supreme Court by a writ of error."

The case of *Turner v. State of La.*, La. 1965, 85 S. Ct. 546, 379 U. S. 466, 13 L. Ed. 2d 424 is referred to in 28 U. S. C. A. § 1257, Note 330 at page 292, where it is said:

"Certiorari by Supreme Court was granted to consider claim that circumstances attending state trial were such as to deprive defendant of rights secured to him by U. S. C. A. Const. Amend. 14."

The case of *Louisiana Power & Light Co. v. City of Thibodaux*, La. 1959, 79 S. Ct. 1070, 360 U. S. 25, 3 L. Ed. 2d 1058, rehearing denied 79 S. Ct. 1442, 360 U. S. 940, 3 L. Ed. 2d 1552 is referred to in 28 U. S. C. A. § 1257, Note 331 at page 293, where it is said:

"Importance of question in judicial enforcement of power of eminent domain under diversity jurisdiction impelled Supreme Court to grant certiorari in condemnation case in which District Court had applied doctrine of absention."

The case of *Allegheny County v. Frank Mashuda Co.*, Pa. 1959, 79 S. Ct. 1060, 360 U. S. 185, 3 L. Ed. 2d 1163, rehearing denied 80 S. Ct. 41, 361 U. S. 855, 4 L. Ed 2d 93 is referred to in 28 U. S. C. A. § 1257, Note 331 at page 293, where it is said:

"Important question presented, as to whether District Court had discretion to abstain from exercise of diversity jurisdiction in circumstances of suit challenging validity of expropriation, impelled Supreme Court to grant certiorari."

Statement of Reasons Why Said Cause Is of Public or Great General Interest and Statement of Constitutional Grounds and Why Writ of Certiorari Should Be Granted.

1. It is a matter of public or great general interest to every property owner and municipality in Ohio to determine whether or not a mere arbitrary legislative enactment declaring it necessary to take property for a public use without proof of necessity and without proof that the

property proposed to be taken will be used for public use within the foreseeable future is determinative of the rights of the parties and deprives the courts of jurisdiction to determine whether or not the taking will be for public use.

2. It is important to determine whether or not Article I, Section 1, and Article I, Section 19 of the Constitution of the State of Ohio and Amendments V and XIV, Section I, to the Constitution of the United States protect the property owner against a legislative determination as to the necessity of taking and as to whether or not the property taken is for public use.

3. It is also important to determine whether or not a municipal corporation may proceed with "excess condemnation" under the terms of Article XVIII, Section 10 of the Constitution of the State of Ohio without defining specifically the purpose of the appropriation as required by the cases above cited.

4. It is also important to determine whether or not Sections 163.02 and 163.08 of the Revised Code are applicable in the above case inasmuch as Section 163.08, effective January 1, 1966, recognizes that the question of the necessity for the taking is a judicial question.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN B. OTERO,
WILLIAM M. BARRETT and
OLIVER TRUE,
Counsel for Petitioner.

APPENDIX.

OPINION OF THE COURT OF COMMON PLEAS, ERIE COUNTY.

(October 26, 1965.)

Plaintiff, South Shore Packing Corporation, has filed an action requesting that the City of Vermilion be enjoined from appropriating certain land owned by the Plaintiff.

The City is seeking in a separate suit to appropriate certain land owned by Plaintiff and alleges that it intends to use the same for a new municipal sewage disposal plant.

The Court agrees with counsel for the Defendant that the taking of this said land will be for a public use and, therefore, the only questions remaining at issue are whether or not the City abused its discretion or exercised bad faith or committed fraud in deciding to appropriate Plaintiff's land.

The evidence presented in this case does not show that any fraud, bad faith, collusion or abuse of discretion was practiced or committed by the Defendant, City of Vermilion.

Therefore, it is ordered, adjudged and decreed that the temporary injunction heretofore issued be vacated and held for naught and the case is hereby dismissed at Plaintiff's costs. Counsel for Defendant may prepare the appropriate Journal Entry.

See Journal.

(S) L. F. KELLY,
Judge.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, ERIE COUNTY.

(October 28, 1965.)

On September 20, 1965, this case was heard on the petition of the plaintiff, The South Shore Packing Corporation, the answer of the defendant, The City of Vermilion, the evidence and the arguments and the briefs of the counsels. The defendant, The State of Ohio, is in default of answer or other pleading.

Upon consideration of the pleadings, the evidence, the briefs and the arguments, and being fully advised in the matter, the court finds that the appropriation by the defendant, The City of Vermilion, of the real estate is for a public use. The court further finds that the Defendant, The City of Vermilion, has not been guilty of any fraud, bad faith, collusion or abuse of discretion in the appropriation.

Therefore the court denies the permanent injunction prayed for in the petition, vacates the temporary injunction previously granted herein, and dismisses the case at the costs of the plaintiff.

Exceptions are granted to the plaintiff.

(S) LEROY F. KELLY,
Judge.

APPROVED:

(S) WILLIAM M. BARRETT,
Attorney for Plaintiff.

(S) DAVID C. GEORGE,
Attorney for Defendant, The City of Vermilion, Ohio.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, ERIE COUNTY.

(November 24, 1965.)

On oral motion of plaintiff the motion for a new trial is hereby amended by interlineation by adding after the paragraph marked "2," the following, to wit: 2a. That the judgment is contrary to the Constitution of the United States of America, to wit: the 14th Amendment thereof.

2b. That the judgment is contrary to the Constitution of the State of Ohio, to wit: the sections 1 and 19 of Article 1 of the Constitution of the State of Ohio.

(S) LEROY F. KELLY,
Judge.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, ERIE COUNTY.

(December 13, 1965.)

After due consideration, the Court hereby overrules plaintiff's motion for a new trial.

Exceptions.

(S) LEROY F. KELLY,
Judge.

DOCKET ENTRY OF THE COURT OF APPEALS, ERIE COUNTY.

(June 16, 1966.)

To: The Clerk of Courts:

Please make the following entry upon our docket in the above-entitled case as of the date of receipt hereof, or as of the date indicated below:

"Motion of appellee to dismiss appeal overruled. Motion of appellant for extension of time within which to file brief granted, and appellant given leave to file said brief on or before June 27, 1966, and appellee granted leave to file answer brief on or before July 11, 1966. Case assigned for oral argument on merits on Friday, July 15, 1966, at 10:00 o'clock, A.M., Court House, Toledo, Ohio." (Clerk of Courts to journalize this entry)

As soon as appellee's brief has been filed, will you please forward the entire file to me here at Toledo. I am enclosing herewith motion prepared by appellants, which please file as of June 16, 1966. Am also returning to you enclosed one copy of appellee's motion to dismiss appeal and brief in support thereof for return to the file.

(S) RAY L. WHITAKER,
Administrative Assistant,
Sixth District Court of Appeals
Court House,
Toledo, Ohio.

JOURNAL ENTRY OF THE COURT OF APPEALS, ERIE COUNTY.

(September 7, 1966.)

On July 15, 1966, this cause was heard as an appeal on questions of law and fact from a decision of the Common Pleas Court for Erie County. The case was heard by this court on the pleadings, the record from the Common Pleas Court, the deposition of Cornelius G. Maloney, a witness, and the briefs and arguments of counsel.

Upon consideration of all of these items, and being fully advised in the matter, the court finds that the action of the defendant-appellee, City of Vermilion, to appropriate certain land owned by the plaintiff-appellant, South Shore Packing Corporation, for a municipal sewage disposal plant is authorized by law; that the appropriation proceedings are valid and were properly initiated by legislation of the City Council of said Defendant-Appellant, pursuant to such appropriation proceedings, is necessary for a public use and purpose; that the evidence does not show fraud, bad faith, collusion or an abuse of discretion on the part of said defendant-appellee.

The court further finds that the introduction into evidence of the deposition of the witness, Cornelius G. Maloney, was proper; and the objection to the introduction of the deposition into evidence is overruled.

Wherefore the court denies the injunction prayed for in the petition of the plaintiff, the petition is dismissed at the costs of the plaintiff-appellant, and this case is

remanded to the Common Pleas Court for Erie County for execution for costs in that court and in this court.

(S) DUDLEY F. SMITH
Judge.

APPROVED:

(S) WILLIAM M. BARRETT
Attorney for Plaintiff-Appellant

(S) OLIVER TRUE
Attorney for Plaintiff-Appellant

(S) DAVID GEORGE
Attorney for Defendant-Appellee, City of Vermilion.

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO.

(January 11, 1967.)

This cause, here on appeal as of right from the Court of Appeals for Erie County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Erie County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

(S) THOMAS L. STARTZMAN
Clerk

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO.

(January 11, 1967.)

Motion for an order directing the Court of Appeals for Erie County to certify its record.

"It is ordered by the Court that this motion is overruled."

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

(S) THOMAS L. STARTZMAN
Clerk

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO.

(February 15, 1967.)

It is ordered by the court that rehearing in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 100.

(S) THOMAS L. STARTZMAN
Clerk